

Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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In the Matter of

Amendment of Part 90 of the Commission's
Rules to Adopt Regulation for Automatic
Vehicle Monitoring Systems

PR Docket No. 93-61

REPLY COMMENTS OF HENNEPIN COUNTY

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REPLY COMMENTS OF HENNEPIN COUNTY TO OPPOSITION COMMENTS OF
COMTRAK AND TELETRAC, INC.

Hennepin County ("Hennepin"), by its attorneys and pursuant to § 1.429(g) of the Federal Communications Commission's ("FCC") rules, hereby submits its reply to opposition pleadings filed by Comtrak and Teletrac, Inc. ("Teletrac") to Hennepin's Petition for Partial Reconsideration (Petition) of the FCC's Second Report and Order in the above captioned proceeding.

I. Introduction

Local government is responsible for the vital mission of providing for the safety of life, health and property of its citizens. Recognizing this fact, Congress amended the

Communications Act through the Balanced Budget Act of 1997¹ to exempt public safety radio services from the requirement of using competitive bidding to assign spectrum. Hennepin County respectfully submits that its intended use of Location Monitoring Service radio technology to enhance its public safety responsibilities is squarely within the public safety exemption mandated by Congress.

II. Granting Hennepin A License for Public Safety LMS Will Not Undermine The Auction Process

Comtrak and Teletrac's arguments do not refute the central point of Hennepin's Petition that, in giving the Commission broad authority to auction most mutually exclusive applications, Congress established several exemptions from competitive bidding in order to serve the public interest. Indeed, Congress clearly stated that the "public safety radio services exemption described herein is much broader than the explicit definition for 'public safety services' contained in section 3004 of this title."²

Teletrac and Comtrak cannot dispute this. Instead they raise the specter that granting Hennepin's Petition would "allow any not-for-profit entity to exercise a right of refusal over any spectrum made available by the Commission, even if allocated for commercial purposes, merely by asserting that it wants the spectrum for public safety uses."³ Both the statutory language of the BBA and Commission practice show that these fears are baseless.

The competitive bidding exemption for public safety radio services is available only to those organizations that use such services to protect the safety of life, health, or property and that

¹ Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997) ("BBA").

² H.R. Conf. Rep. No. 105, 105 Cong., 1st Sess. 217, 572 (1997).

³ Comtrak at 3.

do not make such services commercially available to the public.⁴ The FCC has the authority to evaluate and determine which entities meet these criteria.

Fortunately, what constitutes public safety services is a familiar issue for the FCC. In its Final Report, the Public Safety Wireless Advisory Committee defined public safety as, “The public’s right, exercised through Federal, State or Local government as prescribed by law, to protect and preserve life, property, and natural resources and to serve the public welfare.”⁵ The Advisory Committee also defined public safety service providers as, “Governmental and public entities or those non-governmental, private organizations, which are properly authorized by the appropriate governmental authority whose primary mission is providing Public Safety services.”⁶ As these definitions suggest, the FCC has criteria it can draw from to determine whether the type of service intended to be offered by a provider comports with Congress’s intention of supporting public safety radio services by exempting them from competitive bidding. In other words, it is up to the Commission to weigh Congress’s intent to support local governments’ efforts to provide public safety services versus Congress’s mandate to raise funds by auctioning spectrum to for-profit entities. Hennepin argues that when presented with a local government entity that wishes to obtain spectrum to enhance its traditional public safety services, the Commission should apply the statutory exemption so as not to subject the local government to competitive bidding against well funded, commercial parties.

III. Application of the Public Safety Exemption to the LMS Auction is Consistent with 47

U.S.C. §337 (c)

⁴ 47 U.S.C. 309(j)(2) (1998).

⁵ Final Report of the Public Safety Wireless Advisory Committee, September 11, 1996, at 47. (“Final Report”).

As set forth in Hennepin's Petition, Congress specifically recognized the importance of continuing the public safety radio service exemption from competitive bidding as a way of supporting local public safety services. In other words, Congress made the protection of public health and safety a priority over collecting revenues through spectrum auctions. New radio technologies, which can serve to protect the safety of life, health and property, are constantly being developed. The FCC must in turn regularly reevaluate its spectrum allocations to handle these new technologies. Unfortunately the FCC's efforts to allocate additional spectrum for public safety lag behind the development of new technologies.

Teletrac and Comtrak would have the FCC read the BBA as allowing public safety service providers access to new technologies allocated to spectrum outside of designated public safety bands only when the conditions of Section 3004⁷ are met. This reading of the BBA leads to the conclusion that public safety services that provide free police, fire and medical assistance cannot obtain spectrum for new technologies allocated to non-public safety bands unless they are willing to compete financially in the auction process with for-profit commercial entities. Hennepin submits that this interpretation effectively reads the public safety exemption out of the statute.

The opposition's interpretation also means that only spectrum specifically allocated to public safety radio services, as defined by the FCC, is subject to the exemption. This reading, however, ignores the fact the most public safety spectrum can be shared and is therefore not mutually exclusive or subject to competitive bidding. If the exemption is to mean anything at all, then it must be read to apply to situations in which mutually exclusive applications are more

⁶ Id. at 47.

⁷ BBA §3004, "Allocation and Assignment of New Public Safety Services Licenses and Commercial Licenses," adding Section 337 to chapter 47 of the United States Code.

likely. In other words, it must apply to spectrum allocations outside of traditional public safety bands.

Hennepin disagrees with Comtrak's claim that 47 U.S.C. 337(c), the "Use of Unused Channels for Public Safety Services" provision, should be read as providing the *only* means for public safety entities to obtain unassigned frequencies outside of the 746 to 806 MHz band. Clearly, however, this is one method of obtaining public safety spectrum. Indeed, Hennepin believes that it meets the statutory test under §337 and qualifies for LMS spectrum.⁸ First, although Comtrak contends that spectrum is available below 512 MHz for LMS service, this spectrum is not suitable for LMS. The majority of existing LMS service providers operate in the 902 – 928MHz band because these frequencies offer the best performance and most reliable service. An LMS license below 512 MHz, therefore, would not "satisfy" Hennepin's public safety use because it would not work as intended. Second, the FCC has already structured the 902 – 928 MHz band to minimize problems of interference, thereby negating the risk that Hennepin's LMS system would cause harmful interference. Third, Hennepin is not aware of any other public safety LMS services in its region that would be inconsistent with its proposed use. Fourth, the two year waiting period has expired. The FCC allocated the 908 – 924 MHz band for

⁸ The criteria listed under 47 U.S.C. §337 (c) include:

- A) no other spectrum allocated to public safety services is immediately available to satisfy the requested public safety service use;
- B) the requested use is technically feasible without causing harmful interference to other spectrum users entitled to protection from such interference under the commission's regulations;
- C) the use of the unassigned frequency for the provision of public safety services is consistent with other allocations for the provision of such services in the geographic area for which the application is granted;
- D) the unassigned frequency was allocated for its present use not less than 2 years prior to the date on which the application is granted; and
- E) granting such an application is consistent with the public interest.

LMS over three years ago in March of 1995. Fifth, granting an LMS application to support and enhance public safety and protect the life, health and property of the citizens of Hennepin County is in the public interest.

Hennepin has not elected to apply under §337 because the Commission has adopted rules for assigning LMS licenses. Instead, Hennepin is seeking a modification of those rules so that Hennepin can participate in the licensing process and utilize the public safety exemption. Alternatively, if the Commission believes it would be more efficient for Hennepin to apply under §337, Hennepin can do so.⁹

IV. Application Of The Public Safety Radio Service Exemption To The LMS Auction Is Analogous To The Commission's Consideration Of The Exemption For Public Broadcast Stations

In their opposition pleadings, Comtrak and Teletrac go to great lengths to distinguish the Commission's consideration of the applicability of the exemption from competitive bidding for public broadcast stations. Both commentaries, however, miss the point. Hennepin agrees with Comtrak and Teletrac that Congress, through the BBA, granted the FCC greater authority to auction spectrum. But Congress also put express limits on that authority. Specifically, Congress retained exemptions from competitive bidding for public safety radio services, initial licenses or construction permits for digital television service, and for public broadcast stations. The "Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses" proceeding was the first instance in which the Commission was asked to evaluate the

conflicting policies of efficient auctions versus statutory exemptions from auction. The Commission's difficulty in reaching a conclusion on the matter stems from the fact that applications for exempt services, licenses or stations may be mutually exclusive with auctionable applications. The FCC is currently examining how to structure its auction of broadcast licenses to accommodate Congress's clear statutory exemption for public broadcast stations. The FCC should likewise reconsider how to structure its LMS auction to provide for legitimate public safety radio service applications that are statutorily exempt from competitive bidding.

V. Commercial LMS Services Cannot Adequately Meet the Demands of Public Safety Service Providers for LMS.

While Hennepin County appreciates the fact that both Teletrac and Comtrak believe that their proposed nationwide LMS systems could "meet the reliability needs of Hennepin as well as the needs of other entities within Hennepin's Economic Area,"¹⁰ Hennepin does not agree. Commercial LMS cannot provide the unique characteristics necessary to adequately offer LMS for public safety use. The Public Safety Wireless Advisory Committee came to a similar conclusion in its Final Report:

Public Safety users have operation requirements that differ substantially from other classes of wireless users. Unlike others, the responsibilities of Public Safety users to meet their mission critical obligations require, among other things, (1) dedicated capacity and/or priority access available at all times (and in sufficient amounts) to handle unexpected emergencies, (2) highly reliable (redundant) networks which are engineered and maintained to withstand natural disasters and other emergencies; (3) ubiquitous coverage within a given geographic area; (4) and unique terminal equipment (mobile or portable units) designed for quick response in emergency situations. These unique operational requirements limit

⁹ We note that as of the date of this reply, the Commission has not adopted rules to govern the application process under §337.

¹⁰ Comtrak at 8.

the potential for extensive substitution of commercial services for the dedicated networks currently owned and operated by Public Safety entities.¹¹

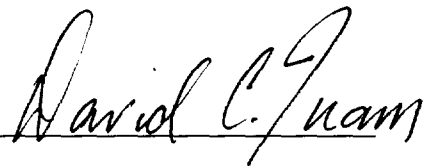
The characteristics outlined by the Public Safety Wireless Advisory Committee are essential to ensuring that LMS can fulfill critical public safety needs. Commercial entities that serve a broad range of customers cannot be expected to devote sufficient resources to carrying out the essentially governmental function of protecting public safety.

VI. Conclusion

Comtrak and Teletrac have failed to refute the central arguments of Hennepin's Petition for Reconsideration. Hennepin County believes that the use of LMS to provide public safety services will produce important benefits to its citizens. We therefore urge the Commission to act expeditiously and grant Hennepin County's Petition for Partial Reconsideration.

Respectfully submitted,

Hennepin County

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¹¹ Final Report at 16.

CERTIFICATE OF SERVICE

I, Carla Littlejohn, a secretary at the law firm of Powell, Goldstein, Frazer & Murphy, do hereby certify that on this 15th day of October 1998, I caused copies of the foregoing "Petition for Partial Reconsideration for Hennepin County" to be served via hand delivery to the following:

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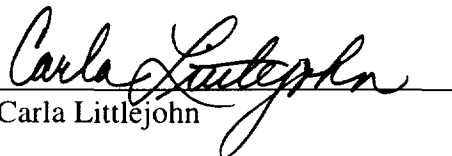
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